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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 435 1

ANNA C. DICKHEISER and EDWARD S. BIRN, on their own behalf and on behalf of all other stockholders of THE PENNSYLVANIA RAILROAD COMPANY, one of the defendants herein,

Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, RICHARD K. MELLON, LEONARD T. BEALE, PIERRE S. duPONT, D. R. McLENNAN, FRANKLIN D'OLIER, ROBERT T. McCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES, GEORGE H. PABST, JR., THE PENNROAD CORPORATION, IONE M. OVERFIELD, GRACE STEIN WEIGLE,

Respondents.

BRIEF OF RESPONDENTS THE PENNSYLVANIA RAILROAD COMPANY, M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, LEONARD T. BEALE, ROBERT T. McCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES AND GEORGE H. PABST, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counsel for above named respondents.

SEPTEMBER 23, 1946.

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IN THE

Supreme Court of the United States

No. .

Anna C. Dickheiser and Edward S. Birn, on their own behalf and on behalf of all other stockholders of The Pennsylvania Railroad Company, one of the defendants herein.

Petitioners,

against

The Pennsylvania Railroad Company, a corporation of the Commonwealth of Pennsylvania; M. W. Clement, C. Jared Ingersoll, Arthur C. Dorrance, Thomas S. Gates, Richard K. Mellon, Leonard T. Beale, Pierre S. duPont, D. R. McLennan, Franklin D'Olier, Robert T. McCracken, Thomas Newhall, James E. Gowen, Richard D. Wood, J. F. Deasy, Walter S. Franklin, J. R. Downes, George H. Pabst, Jr., The Pennroad Corporation, Ione M. Overfield, Grace Stein Weigle,

Respondents.

BRIEF OF RESPONDENTS THE PENNSYLVANIA RAILROAD COMPANY, M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, LEONARD T. BEALE, ROBERT T. McCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES AND GEORGE H. PABST, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania herein is reported in 5 F. R. D. 5 (October 11, 1945). The opinion of the Circuit Court of Appeals for the Third Circuit herein (filed May 27, 1946) is reported in 155 F. (2d) at p. 266.

JURISDICTION.

The jurisdiction of this Court has been invoked by petitioners under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. 347(a)).

COUNTER STATEMENT OF THE CASE.

(*a*) NATURE OF THE CASE.

The ultimate question presented by the complaint in the present case is, whether or not an agreement of settlement which disposes of certain litigation against The Pennsylvania Railroad Company was an appropriate one for the directors of that Company to approve, in the exercise of their judgment and discretion as such directors. The complaint, which is filed by two stockholders alleging that they are the owners of 120 shares of the stock of The Pennsylvania Railroad Company, seeks an injunction against the directors to prevent the carrying out of the agreement of settlement, or, in the alternative, damages if the agreement of settlement should be carried out. On this ultimate question, the courts below, applying well-settled common-law tort principles of the law of Pennsylvania—which in this case is admittedly the applicable law—held that the agreement of settlement was a proper exercise of the directors' discretion, and dismissed the complaint.

(*b*) CONTENTS OF RECORD BELOW.

These respondents filed an answer to the complaint, in which it was pointed out that the litigation disposed of by the agreement of settlement, which had been pending in the courts for many years and had gone through numerous protracted proceedings, presented a possible danger of liability on the part of the Railroad Company to the extent of many millions of dollars, that counsel for the Railroad Company could give no assurance as to the successful outcome of that litigation, and that in view of all the circumstances the directors had concluded that it would be to the best interests of the Railroad Company to dispose of this source of harassment and the danger of burdensome liability which it presented, by means of the settlement agreement.

Following the filing of that answer, counsel for petitioners herein, purporting to proceed under Rule 56 of the Federal Rules of Civil Procedure, served notice for taking the depositions of most of the respondent directors and of other persons. As a result of this procedure, petitioners' counsel, during five full days of taking depositions, obtained, by unlimited cross-examination, the statements of twelve of the directors of the Railroad Company, these being all the directors of the Railroad Company who were available for that purpose and, with two exceptions, all the directors who participated in the approval of the settlement agreement. Petitioners' counsel also obtained the depositions of numerous other persons who were in one way or another involved in or concerned with the settlement agreement and the negotiations leading up to it. All these depositions were before the District Court, in the form of affidavits in support of a motion by these respondents for summary judgment in their favor. In addition, there were before that court the affidavits of the two remaining directors of the Railroad Company, who participated in the approval of the settlement agreement but were not available for the

taking of depositions, reciting in full their participation and their reasons for approving the settlement. The District Court thus had before it the statement of every one of the directors of the Railroad Company, with the exception only of one director, who had died before the settlement in question was proposed, and two other directors who, because of participation in the affairs of the United States Government, were absent from the directors' meetings which considered the proposed settlement and in no way participated in the consideration or approval of it. Also before the District Court were the statements, obtained in the same way, viz., by petitioners' counsel on cross-examination, of every other person who had any substantial part in the negotiations leading up to the settlement.

When confronted by the affidavits of all the directors concerned, embodying the depositions taken by petitioners' counsel, and filed under the summary judgment rule, petitioners, although given full opportunity to present counter-affidavits, as contemplated by the rule, presented only an affidavit by their counsel, setting forth not facts but legal arguments allegedly in support of their position. No affidavit of facts in contradiction of the facts testified to by the directors in their depositions was offered by petitioners.

Thus, the basis upon which the District Court reached its determination included the statements of all persons who were in a position to know and explain the various factors which led to the settlement agreement and which caused the directors of the company to approve that agreement. These statements contained full and repeated explanations and discussion of what these factors were and what was in the minds of the directors of the Railroad Company when they determined that it would be desirable, from the standpoint of the Railroad Company, to approve the settlement agreement. With the exception of the statements of the two directors above referred to, who were not available for depositions, these statements

were all elicited on cross-examination by petitioners' counsel, and furthermore they were not contradicted by any counter-affidavit of facts on petitioners' side. These statements therefore must be taken to present all that petitioners would be able to bring out on the trial of the case. No genuine issue of material fact appears from these statements, and all the materials for a complete decision of the ultimate question on the merits were before the District Court.

(*c*) Action of Courts Below.

On the basis of the record thus made before it, the District Court concluded that there was no genuine issue as to any material fact and that the case was appropriate for application of the summary judgment rule. It found, upon analysis, that petitioners' arguments rested not on any factual evidence of a breach of duty by these respondents but on certain legal contentions and assumptions as to the effect to be given in one suit to the decision of another suit and other legal assumptions. In the language of Judge Bard, for the District Court (5 F. R. D. 10):

> "These legal assumptions, which find no support in the law, form the core of complainants' charge that the directors of Pennsylvania are giving away $15,000,000 of Pennsylvania's assets to settle litigation in which the corporation allegedly finds itself victorious. If these fallacious legal conclusions, which were alleged as facts in the complaint, are discarded, as they must be, the allegation of fraud and neglect of duty is stripped of its factual support."

Since petitioners' case thus rested not upon a bona fide showing of facts but upon legal contentions stated as though they were facts, it was entirely clear that there was no genuine issue of material fact and that the summary judgment rule was properly applicable. Applying that rule, the District Court concluded that the allegations

in the complaint of fraud and neglect of duty on the part of the directors were wholly unsupported. As stated by Judge Bard (5 F. R. D. 10):

> "Complainants' bare allegation of fraud and neglect of duty, without allegation of cognizable facts which constitute the fraud and neglect of duty, is insufficient to create a cause of action. Aetna Casualty & Surety Co. *v.* Abbott, 4th Cir., 130 F. (2d) 40; Hirshhorn *v.* Mine Safety Appliances Co., D. C. Pa., 54 F. Supp. 588; United States *v.* Hartmann, D. C. Pa., 2 F. R. D. 477; Lopata *v.* Handler, D. C. Okl. 37 F. Supp. 871, appeal dismissed 10 Cir., 121 F. (2d) 938."

The District Court went further and found that the petitioners' charges of fraud and neglect of duty were not only unsupported but were affirmatively disproved by the statements which these respondents had submitted to the court. The court, after reviewing the various factors which led the directors to approve the settlement agreement, stated its conviction that "from the affidavits it is apparent that these factors were fully discussed at the Board meetings and they sufficiently indicate that the directors, in approving the settlement, were acting in good faith for what they thought was the best interest of the railroad" (5 F. R. D. 10).

Accordingly, a summary judgment for the respondents was entered. On appeal to the Circuit Court of Appeals, this judgment was affirmed, in a *per curiam* opinion which adopted the opinion of the District Court (155 F. (2d) 266).

(*d*) Petitioners' Violation of this Court's Rule 38.

Contrary to the requirements of paragraph 1 of Rule 38 of this Court, petitioners have not filed with this Court any transcript, either certified or uncertified, of the record in this case. They have filed with their petition a document entitled "Appendix to Brief of Complainants-

Appellants", in which they have printed a very small portion of the voluminous record which was before the District Court. It is submitted that petitioners, upon whom rests the burden of persuading this Court to issue its writ of certiorari, have failed in a materially important respect to meet that burden by their failure to file with this Court a complete transcript of the record, and that this failure alone should constitute a sufficient ground for a dismissal of the petition (*Bailey* v. *Arizona ex rel. Murphy*, 275 U. S. 575, 48 S. Ct. 31 (1927)). Without a complete transcript of the record before it, this Court has no proper basis upon which to found the conclusion that the action of the courts below should be reviewed, and the petitioners, by their failure to supply the Court with such a basis, cannot throw upon respondents the affirmative duty of providing a basis for the conclusion that the action of the courts below should not be reviewed.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

Whether an appropriate occasion is presented for this Court to issue its writ of certiorari and review the decisions of the lower courts in a proceeding where it appears that:

(*a*) The ultimate question at issue is whether or not the action of the directors of a corporation in authorizing the settlement of the litigation met the standard of care imposed by the law of Pennsylvania, and both lower courts held that it did;

(*b*) On a record which included the statements, elicited upon cross-examination by petitioners' counsel, of all the corporate directors and others involved in the making of the settlement agreement, both lower courts held that there was no disputed issue of material fact and that a summary judgment should be granted in favor of the respondents.

ARGUMENT.

This suit presents no occasion for the issuance of a writ of certiorari. No questions of important public policy are involved. The suit turns not upon any question of interpretation of the Federal Constitution or of any Federal Statute, but merely upon the application of principles of local tort law to uncontradicted and undisputed facts. The applicable local law is that of Pennsylvania, and there is no dispute with regard to the applicability of that law. The judges of the District Court and the Circuit Court of Appeals, trained in Pennsylvania law and sitting in Pennsylvania, have concluded that the undisputed facts of the case do not, under Pennsylvania law, provide any basis for liability and have accordingly dismissed the complaint. There is no reason for this court to issue its writ of certiorari for the purpose of reviewing that decision.

Petitioners raise the question as to whether or not the courts below acted properly in holding the summary judgment rule applicable. But a brief examination of the case will make it plain that, since there is no dispute as to the material facts and the only questions before the courts below were legal ones, and since all the materials necessary for a decision on those questions were before the courts below, the case is a wholly appropriate one for the application of the summary judgment rule.

I. The District Court and The Circuit Court of Appeals Did Not Err in Concluding that Respondents' Motion for Summary Judgment Could Properly be Granted on the Record Made in the District Court.

This case was before the District Court and the Circuit Court of Appeals on the motion of these respondents for a summary judgment in their favor, based on the affidavits filed in support of the motion, to which were attached all the depositions taken at the instance of peti-

tioners' counsel, and on the pleadings and other papers before the District Court.

Rule 56 of the Federal Rules of Civil Procedure provides that a party against whom a claim is asserted may at any time "move with or without supporting affidavits for a summary judgment in his favor." The rule accords the adverse party an opportunity to file opposing affidavits, and then goes on to state that "the judgment sought shall be rendered forthwith if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This language plainly indicates that, when a motion for summary judgment has been made by one party, with supporting affidavits, and when opportunity has been given the adverse party to file opposing counter-affidavits, it is then the duty of the court to examine the pleadings, affidavits and counter-affidavits, and any other papers before the court, in order to determine whether or not the various factual statements made by the respective parties show that there is any genuine issue as to any fact which is material in the light of the issues of law framed by the pleadings. If from such examination the court should conclude that there is no real dispute between the parties as to what actually occurred, and therefore no genuine issue of fact, or that such issues of fact as there may be are not material, and that the questions presented for the court's decision, on the basis of the papers before it, are questions of law or of the application of the law to the substantially undisputed facts, then the court must render the judgment sought if it is satisfied that the moving party is entitled thereto on the legal issues.

A. All the Materials Necessary to a Decision Were Present in the Record Before the Courts Below.

The question before the courts below in this case was simply whether or not the directors of The Pennsylvania Railroad Company were acting within the legitimate limits of their discretion as directors in approving an agreement of settlement. In determining that question, the factors which are relevant and important for the court to consider are the provisions of the agreement and the reasons which led the directors to approve it. All of that information is in the record which was before the District Court on the respondents' motion and before the Circuit Court of Appeals on appeal. The agreement itself appeared as Exhibit D attached to the answer of the respondents, and is also set forth in the corporate minutes which are in the record. The reasons which led the directors to approve the agreement, the consideration and discussion which they gave to the matter, and the advice of counsel upon which they relied, all appear from the statements of the directors themselves, which are in the record. As already pointed out, the statements which were before the court included the statement, under oath, of every director of the Railroad Company who participated in the consideration of the agreement, and of every other person who had any substantial part in the negotiations leading up to the agreement. All these statements represented the testimony of the directors and other persons involved, given in response to unlimited cross-examination by counsel for petitioners, with the exception only of the statements of two directors who were unavailable at the time the depositions were taken by petitioners' counsel, and whose affidavits under oath were subsequently supplied.

Despite the opportunity given the petitioners, in accordance with the summary judgment rule, to present counter-statements of fact, petitioners failed to controvert any material fact set forth in the respondents' affidavits

and depositions and failed to add any material facts. No counter-affidavit of facts was filed at all by petitioners, and the only affidavits in this case filed in their behalf were affidavits of their counsel, which affidavits contained only legal arguments and did not contain any statement of facts in contradiction of or in addition to the material facts set forth in respondents' affidavits.

B. THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT IN THIS CASE, AND THE CONTROVERSY TURNS WHOLLY UPON LEGAL QUESTIONS.

Thus, petitioners have not controverted any of the material facts. As already stated, the facts which are material are those with respect to the terms of the agreement itself and with respect to the reasons which the directors had in mind in approving it. The terms of the agreement speak for themselves. Moreover, there can be no dispute on this record as to what was in the minds of the directors in approving the settlement, since the directors themselves have stated what they had in mind and what the factors were which guided them in reaching their conclusion. Petitioners have attempted to build up an alleged dispute as to material facts out of minor differences with respect to wholly immaterial matters. Thus, it has been suggested that there is a dispute in the record as to who first spoke to whom in opening the negotiations which culminated in the agreement, and exactly what words were used in those initial conversations. But these are totally unimportant questions and are entirely irrelevant to the fundamental question in the case, viz., whether or not the settlement agreement was a proper one for the directors to approve. With regard to that question, the important and controlling factors are the provisions of the agreement itself, and the reasons which led the directors to approve it.

Those factors have been fully laid before the courts

below, in the agreement itself and the statements of the directors obtained through the extended and unlimited cross-examination which has been allowed to petitioners' counsel. These statements disclose no dispute as to the grounds which the directors had in mind in approving the agreement or as to any material fact affecting the reasonableness or propriety of those grounds; and petitioners, although given full opportunity, in accordance with the rule, to contradict these facts by counter-affidavits, have not done so, but have merely filed legal arguments in the form of affidavits by counsel. There is accordingly no genuine dispute as to any material fact on the record in this case.

C. Petitioners Confuse the Question as to Whether or not There is a Genuine Issue of Material Fact with the Question as to Whether or Not the Undisputed Facts Sum Up into a Particular Legal Conclusion.

Petitioners insist that the summary judgment rule is not applicable here because there are issues in dispute. But, as already shown, the material facts are not contradicted and there is no dispute as to them. The only dispute in the courts below was as to the legal effect of those facts, *i. e.*, what were their legal consequences. Those are plainly questions for the court, which may properly be decided under the summary judgment procedure. Petitioners are attempting to distort those issues into alleged issues of fact, in order to defeat the summary judgment rule and have the case sent back for a trial. But petitioners' mere allegation that the issues involved are issues of fact does not alter their nature or convert them from what they really are, viz., issues as to the conclusions to be drawn from the facts and the legal consequences thereof. As the District Court put it, "a close study of the pleadings and the voluminous supporting affidavits reveals no genuine issue of material fact"; and further, the petitioners' "purported issues of fact are, in reality, questions of law or ultimate conclusions of subjective facts

to be deduced by the Court from facts which are not disputed" (5 F. R. D. 9).

Petitioners' whole case, according to the District Court, is "based on an erroneous interpretation of the legal effect of the Circuit Court decision in the Overfield-Weigle case" (5 F. R. D. 10). That their case turns on this legal question has now been conceded by the petitioners themselves. In their petition for certiorari (page 9) they describe their own case as follows:

> "The essence of plaintiffs' contention in this complaint is that the decision of the court below (the Circuit Court of Appeals) in the Overfield-Weigle suits is determinative of the Perrine suit in the Delaware State courts and bars liability in that suit, and that therefore there was no reasonable basis for settlement of the Perrine suit."

In other words, petitioners' entire case lies in their contention that the decision of the Circuit Court of Appeals in one set of cases, to the effect that recovery in those cases is barred by the statute of limitations, is *res adjudicata* and therefore determinative of a wholly separate case pending in another court in a different jurisdiction. This question, and the propriety of the position which the respondent-directors took with respect to it, are purely legal questions, which may accordingly be decided by the court upon a motion for summary judgment. Of course, the determination of these questions necessarily involves the knowledge of certain facts—*e. g.*, in which courts the various cases are pending, what has happened in those courts, the similarities and differences between the suits involved, etc. Most of these are matters which are set forth in the pertinent court opinions and of which the courts below could therefore properly take judicial notice. But in any event, there was no dispute whatever in this record as to any of these essential facts. The only dispute was as to the ultimate legal conclusions to be drawn from them.

D. THE SUMMARY JUDGMENT RULE WAS PROPERLY HELD TO BE APPLICABLE.

The situation thus presented in the record before the courts below brings the case squarely within the governing principles applicable under the summary judgment rule. These principles have been clearly and succinctly set forth by Mr. Justice Rutledge, while sitting on the Court of Appeals for the District of Columbia, in *Fox* v. *Johnson and Wimsatt,* 127 F. (2d) 729 (1942). In that case it was held by that Court that summary judgment was properly granted for the defendant therein on the basis of the affidavits and other papers before the Court, and Mr. Justice Rutledge, speaking for the Court, said (pages 736-37):

> "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. In other words, *the evidentiary facts were not substantially in dispute.* * * * *Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court.* The court had before it all the facts which formal trial would have produced. *Going through the motions of trial would have been futile.* Judgment therefore was properly given for the defendant." (Emphasis supplied.)

That language is exactly applicable here. With the full statements of all the directors of the railroad company, elicited upon practically unlimited cross-examination by petitioners' counsel, before the District Court, together with the statements of numerous other persons concerned in one way or another in the matter, that court, as well as the Circuit Court of Appeals, had all the essential and relevant "evidentiary" facts which a formal trial would produce, and going through the motions of such a

trial would have been futile. As Mr. Justice Rutledge indicated, in the language just quoted, the rule is applicable where, as here, there is no real dispute as to the material facts; and the application of the rule is not prevented by the fact that there may be a conflict among the parties concerning the proper interpretation placed upon the facts and the ultimate inferences and conclusions to be drawn from them, so long as there is no real dispute as to any material phase of what actually occurred. In the present case there is no dispute as to any material phase of what has actually happened.

One very important case which serves to answer petitioners' position on the summary judgment rule—but which petitioners themselves, strangely enough, cite as being in support of their position—is *Associated Press* v. *United States,* 326 U. S. 1, 65 S. Ct. 1416 (1945). In that case this Court and the lower courts were confronted with an anti-trust suit in which a highly complicated factual situation was presented. This Court nevertheless held that the complexities in the facts of the case and the vigorous dispute between the parties as to the conclusions to be drawn from them and the ultimate legal result to be reached did not constitute an impediment to the application of the summary judgment rule, and concluded that that rule was applicable. Here the factual situation is much less complex, and, since the only controversy is as to the conclusions to be drawn from the facts and the legal result to be reached, the summary judgment rule is likewise applicable.

Of the many other cases in which the summary judgment rule has been held applicable in similar situations, the following may be cited as appropriate examples: *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F. (2d) 1016 (C. C. A. 3rd, 1942); *Engl* v. *Aetna Life Insurance Co.,* 139 F. (2d) 469 (C. C. A. 2d, 1943); *Lopata* v. *Handler,* 37 F. Supp. 871 (E. D. Okla., 1941).

Petitioners in arguing against the applicability of the summary judgment rule cite a number of cases (pages 13-

14 of the petition) in which the applicability of that rule was at issue. But none of these cases is authority against the application of the rule here, as an examination of them will show.

In *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724 (1944), the entire controversy turned on questions of valuation of natural gas, and this Court held that it was improper for the trial court to base its findings as to values on the affidavits of experts which were controverted in the record. Similarly, in *Arnstein* v. *Porter*, 154 F. (2d) 464 (C. C. A. 2d, 1946), on which petitioners appear to place their chief reliance, the plaintiff charged infringement of copyrights and demanded a jury trial, and, upon affidavits and depositions filed under the summary judgment procedure, the controversy resolved itself into allegations on the plaintiff's side of copying by defendant of plaintiff's musical compositions and categorical denials on defendant's side that he had ever seen or heard any of plaintiff's compositions. These allegations and denials presented a clear issue of disputed material facts, and the application of the summary judgment rule under those circumstances deprived the plaintiff of his right to trial by jury. The court therefore held quite properly that the summary judgment rule should not have been applied.

It may be noted that in both of those cases it appeared that the application of the summary judgment rule deprived the plaintiff of his right to a trial by jury. In the present case no such situation is presented. Even if the summary judgment rule were held to be not applicable and the case were returned for trial, the trial would be held before a District Judge sitting in equity without a jury inasmuch as the suit is for an injunction.*

* While it is true that the complaint in the present case also asks for damages in the alternative, the fact is that the act which is complained of—viz., the carrying out of the settlement agreement—has not yet happened, and petitioners could not possibly show damages until that has happened. Therefore, the only remedy which petitioners could properly claim at the present time would be that of an injunction, which would of course require an equity trial.

But the District Judge has already had before him the statements of all the persons who would be called to testify in such a trial, and has thus had full opportunity to determine from those statements whether or not a trial was needed. This is plainly a different situation from one in which the application of the summary judgment rule acts to deprive a litigant of the trial by jury to which he otherwise would be entitled and to compel him to have his case determined solely by the trial judge.

In *Doehler Metal Furniture Co. Inc.* v. *United States,* 149 F. (2d), 130, (C. C. A. 2d, 1945), another case cited by petitioners, a suit for damages for breach of contract was determined by means of the summary judgment rule, and the determination included a fixation of damages. Certain material questions of fact existed with respect to the fixation of the damages, and the court appropriately held that those questions should have been tried out. In *Arenas* v. *United States,* 322 U. S. 419, 64 S. Ct. 1090 (1944), the suit involved the determination of the rights of an Indian to certain land allegedly allotted to him under the statutory procedure providing for such allotment, and this Court concluded that the government's legal arguments were inadequate, as a matter of law, to establish the absence of legal right to the land in the petitioning Indian, and therefore reversed the summary judgment which had been entered at the government's request and sent the case back for trial, since the petitioner had not moved for summary judgment against the government. Thus the reversal of the lower court's decision in that case turned wholly upon the substantive questions of law which were presented, and not upon the appropriateness of the case for application of the summary judgment rule. In *Associated Press* v. *United States,* 326 U. S. 1, 65 S. Ct. 1416 (1945), as already pointed out above, the application of the summary judgment rule upon a bill for injunction brought under the Sherman Anti-trust Act was approved by this Court. Likewise, in *Toebelman* v. *Missouri Kansas Pipe Line Co.,* 130 F. (2d)

1016 (C. C. A. 3rd, 1942), referred to above as supporting respondents' position, the application of the summary judgment rule to a stockholder's derivative suit seeking an accounting for allegedly wrongful acts by the corporation directors was approved with respect to certain of the causes of action alleged, and was disapproved only with respect to one, as to which the Court found that an independent investigation of a certain account was necessary in order to determine questions as to certain amounts of money in issue, and as to which summary judgment was therefore clearly improper because of the dispute as to material facts.

Thus, it is clear that none of the cases cited by petitioners in which the summary judgment procedure under the Federal Rules of Civil Procedure was involved has any applicability to the present case. In each of the cases cited in which the summary judgment rule was held not applicable, the court (with the exception of the *Arenas* case, where the defense was held inadequate on the questions of law involved) quite properly found that there were disputed issues as to material facts, and it also appeared in those cases that the application of the summary judgment rule resulted in a denial to one of the litigants of his right to a trial by jury on those disputed issues of fact. As already indicated, there are no disputed issues of material fact in the present case, but only disputes as to legal conclusions to be drawn from the uncontroverted facts, and petitioners are in no way being deprived of any right to trial by jury.

Before leaving this discussion of the applicability of the summary judgment rule to the present case and petitioners' argument with respect thereto, brief reference should be made to two different and clearly untenable assumptions on which petitioners' argument in this respect appears to be based.

One of these erroneous assumptions is that, whenever negligence or bad faith is charged, there must be a trial

(see discussion at page 15 of petition). But there is plainly no foundation, either in the summary judgment rule, or in its history or in the decisions under it, for assuming such a generic exception to its range of application. The discussion of this rule, in the Proceedings of the Institute on the Federal Rules of Civil Procedure, made it plain that the rule was intended to apply to any kind of case, including tort actions as well as other types of action. The member of the Advisory Committee charged with the explanation of Rule 56 made the following statements on this very point:

New York proceedings (p. 265 of Washington and New York Proceedings of the Institute on the Federal Rules of Civil Procedure):

> "*Under the federal Rule, a summary judgment is available in any kind of case.* It was first authorized in England for liquidated claims for money only, and was employed exclusively as a procedure for collecting debts. It was later extended to actions for possession of land or chattels. Now it embraces all actions with the exception of six or eight types specially enumerated. *Under the federal rules it extends to every possible action,* and also to a demand for declaratory judgment. * * * The New York Rule covers unliquidated claims arising on contracts, but it does not cover unliquidated claims arising out of tort; *whereas the federal rule applies to tort actions as well as any other type of action.* Under the New York practice the defendant may use this remedy not only in the eight types but in any type of action if his defense is founded on documentary evidence, but otherwise he can use it only in the eight kinds of action enumerated in the rule. *The federal rule makes no such distinction and the remedy is available to the plaintiff and defendant equally in every type of action.*" (Emphasis supplied.)

Cleveland proceedings (pp. 295-96 of Cleveland Proceedings of Institute on Federal Rules):

> "The next feature I am to discuss is summary judgments. Rule 56 provides for summary judgments. Those judgments are judgments rendered in cases where there is no issue of fact to be tried. There are many cases which, in their earlier stages, seem to be such as to involve issues of fact, but which turn out to contain no issues whatever. In such cases summary judgments may be rendered when it appears in the case that there is in fact no issue to be tried. * * * *There is no restriction in the rules as to the types of case in which a summary judgment may be applied for.* * * * In New York they have been extending the scope of summary judgment proceedings, and they have included equitable actions for foreclosure of liens or mortgages, specific performance and accounting. *.Under Rule 56 of the new federal rules there is no restriction whatever. It can be used in any type of action.*" (Emphasis supplied.)

In accordance with this interpretation of the summary judgment rule, numerous decisions have held it applicable in stockholders' derivative suits against directors of their corporations for alleged neglect or breach of duty on the part of the directors; the following cases, all of which have been cited above, are appropriate examples: *Fox* v. *Johnson & Wimsatt,* 127 F. (2d) 729 (1942); *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F. (2d) 1016 (C. C. A. 3rd, 1942); *Lopata* v. *Handler,* 37 F. Supp. 871 (E. D. Okla., 1941).

The other fallacious assumption which appears to be implicit in petitioners' argument is that the summary judgment rule is not applicable if either party should object to its application (see discussion at bottom of page 13 of petition). This assumption, if sound, would obviously make a nullity of the summary judgment rule,

since any party who was unable to contravert the facts stated in the affidavits filed under that rule and who recognized the weakness of his legal position could defeat the application of the rule and insist on a trial, for the purpose of merely "fishing" for evidence, by simply objecting to the application of the rule. That the rule is not subject to being defeated merely by the whim of either party, and is not rendered inapplicable merely because of the possibility that controverting evidence *may* be produced by the opposing party at a trial, although he is not able to produce affidavits in support of his position, has been clearly pointed out by Circuit Judge Clark, who speaking for the Second Circuit Court of Appeals in *Engl* v. *Aetna Life Insurance Company,* 139 F. (2d), 469 (1943), said (pp. 473 of 139 F. (2d)):

> "In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence * * *. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."

This expression of Judge Clark squarely meets the petitioners' situation in this case. Petitioners have shown that they have no evidence or statements of specific facts to offer in support of their allegations, and that, as Judge Bard has said, when those allegations are stripped of the fallacious legal arguments which petitioners have ad-

vanced in conjunction with them, they are entirely without factual support (424a). Petitioners' insistence upon a trial represents nothing more than an attempt to "fish" for evidence to make up for their own lack of it. If the summary judgment rule is not applicable in such a situation, then it is without meaning or effectiveness.

It follows from what has been said above that the courts below did not err in holding the summary judgment rule applicable in this case.

II. The Question of Law, Which Was the Sole Question Presented Upon Respondents' Motion for Summary Judgment, viz., Whether or not the Directors Acted Properly in Approving the Settlement Agreement, Calls Merely for the Application of Common Law Tort Principles, Under the Applicable Local Law, as to Which There is no Dispute, and Therefore no Issue Worthy of the Attention of this Court is Presented.

It has already been shown that the question on the merits of this case is simply whether or not the directors of The Pennsylvania Railroad Company acted properly and within the legitimate limits of their discretion as directors in approving the agreement of settlement with Pennroad. In determining this question, the Federal Courts, whose jurisdiction in this case has been invoked solely on the ground of diversity of citizenship, must be governed entirely by the tort principles of the law of Pennsylvania, where the directors met and acted and where the settlement agreement was enterd into (see *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938); *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860 (1938); *Guaranty Trust Co. of New York* v. *York,* 326 U. S. 99, 65 S. Ct. 1464 (1945).

There is no dispute here as to what law is applicable, or what the general principles of that law are. Petitioners raise no question, and could raise no question, as to the applicability of the law of Pennsylvania. Under

that law, the principles governing the liability of directors of a corporation and the extent of their discretion in settling litigation against the corporation are clearly established by a number of cases, of which the leading one is *Chambers* v. *McKee & Bros.*, 185 Pa. 105 (1898), where it was held that a settlement entered into honestly and in good faith by the directors of a corporation, with respect to litigation against it, is binding upon the corporation and all its stockholders, even though it may represent an error of judgment. The judges of the District Court and Circuit Court of Appeals below, trained in Pennsylvania law and sitting in Pennsylvania, applied those principles of Pennsylvania law to the undisputed facts of the present case and concluded not only that there was no fraud or bad faith on the part of the respondent directors in entering into the settlement agreement in question, but that those directors had reasonable and sufficient grounds for the settlement agreement. In that respect the District Court's opinion, which was adopted by the Circuit Court of Appeal, concluded that "from the affidavits it is apparent that these factors [*i. e.*, the factors bearing on the advisability of entering into the settlement agreement] were fully discussed at the Board meetings and they sufficiently indicate that the directors, in approving the settlement, were acting in good faith and what they thought was the best interest of the railroad" (5 F. R. D. 10). The court further concluded that the petitioners' legal assumptions, which it found to have no support in the law, formed the core of the charge against respondents, and "if these fallacious legal conclusions, which were alleged as facts in the complaint, are discarded, as they must be, the allegation of fraud and neglect of duty is stripped of its factual support" (5 F. R. D. 10).

Accordingly, there is no occasion for this Court to undertake to review this application of the local common law tort principles to the undisputed facts. No question of important public policy or of the interpretation of the

Federal Constitution or a Federal statute is involved, and there is therefore no reason for this Court to divert its attention from the many matters of much greater importance which are constantly before it, for the purpose of reviewing this case.

CONCLUSION.

For the reasons above stated, it is submitted that the petitions for certiorari herein should be denied.

Respectfully submitted.

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